SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 19106

JOSEPH FORTIN, SAMUEL KOFKOFF, ROBERT KOFKOFF AND
KOFKOFF EGG FARM, LLC

V.

HARTFORD UNDERWRITERS INSURANCE CO. and THE NORTH RIVER INSURANCE
COMPANY

BRIEF OF THE PLAINTIFFS-APPELLANTS

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STATEMENT OF THE ISSUES

Did the Appellate Court properly affirm the trial court decision granting summary judgment in favor of the defendant North River Insurance Company?

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I. STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

The instant appeal arises out of an insurance coverage dispute. In 1987, Connecticut National Bank instituted a foreclosure action against Julius and Dora Rytman (Connecticut Nat'l Bank v. Rytman, No. CV-87-505741S) (the "CNB Action"); (see also Compl. 1-2, May 22, 2003; A25.) The Rytmans cited in Joseph Fortin, Samuel Kofkoff, Robert Kofkoff and Kofkoff Egg Farm, LLC, who are the Plaintiffs-Appellants in this appeal (hereinafter collectively referred to as "Plaintiffs") as third party defendants in the CNB Action. (A25.)

The CNB Action continued for almost fifteen years. Ultimately, in September 2002, after three previously failed mediation attempts, Hon. Owen Eagan, a federal magistrate judge, mediated a $3,150,000 settlement between Plaintiffs and the Rytmans ("2002 settlement"). Plaintiffs contributed $2,500,000 towards the $3,150,000 settlement with the Rytmans to resolve the CNB Action.[1] (Compl. 9, 14, May 22, 2003.) Home Insurance Company, which had insured Plaintiffs under a primary policy of commercial general liability insurance for a period of time that coincided with certain of the events underlying the CNB action, paid the balance.[2]

On or about May 30, 2003, Plaintiffs commenced the present breach of contract and declaratory judgment action against the Hartford Underwriters Insurance Company ("the Hartford") and the Appellee North River Insurance Company ("North River", hereinafter referred to as Defendant), Fortin v. Hartford Underwriters Ins. Co., No. HHD-X04-CV03-4033596, as a result of their respective failures to defend Plaintiffs in the CNB Action

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[1] David Geranomus, a nationally renowned mediator, handled two of the three previous mediations, with Judge Eagan mediating the other. (A201.)

[2] The Home is not a party to this appeal.

pursuant to certain insurance policies. The Hartford, like the Home, had insured Plaintiffs under a primary commercial general liability insurance policy during the period in which certain of the events alleged to give rise to the CNB action occurred. (A25.) Contemporaneously, North River insured Plaintiffs under a policy of excess insurance. (A25.) Plaintiffs claimed damages from both, including compensation from Defendants for the amount they had paid toward the settlement. (Compl. 17-18, May 22, 2003.)

Plaintiffs moved for partial summary judgment on counts one, three and four of the complaint, claiming the defendants, North River and the Hartford, breached their respective duties to defend them as a matter of law. Both of these defendants also moved for partial summary judgment alleging they had no duty to defend Plaintiffs. On April 6, 2005, the court, Quinn, J., held as that as a matter of law both had breached their respective duties to defend Plaintiffs in the CNB action. (A39, A42-43.) Judge Quinn granted Plaintiffs' motions for partial summary judgment as to counts one, three and four of the complaint and denied Defendants' motions for partial summary judgment as to the same counts. (A44.)

On March 31, 2008, the Plaintiffs disclosed Dale Faulkner, Esq. ("Faulkner") as an expert to opine that Plaintiffs' 2002 settlement was objectively reasonable. (A45.) North River disclosed Joel Rottner, Esq. ("Rottner") to opine that the settlement was unreasonable. (A47-49.) On June 10 and 13, 2007, counsel for North River took Faulkner's deposition. Counsel for the Hartford was present and participated. (A151-52, A193.) The deposition revealed that Faulkner, in arriving at his opinion, reviewed and relied upon a banker's box full of documents and exhibits, all of which were available to counsel for both Hartford and North River at the deposition and which were identified in Plaintiffs' objection to North River's motion for summary judgment. (A206-07, A99-103.)

On October 6, 2008, nine months before the trial was scheduled to commence, North River filed a motion to preclude Faulkner as an expert witness, arguing that Faulkner should be precluded from testifying that the Plaintiffs' Settlement was objectively reasonable because: "(1) his opinion is based upon insufficient facts and therefore is without an adequate foundation; (2) he does not know the amount of consideration that the plaintiffs paid to settle the CNB Action; and (3) he failed to apply a reliable methodology to form his opinion." (A61.) North River attached Faulkner's complete deposition transcript to its motion, and argued that Faulkner's opinion lacked an adequate foundation as of the time of his deposition. (A62.) North River simultaneously filed a summary judgment motion arguing that Plaintiffs were required to present expert testimony as to the reasonableness of Plaintiffs' Settlement, and if Faulkner's testimony were precluded, summary judgment should enter because without expert testimony, North River reasoned, Plaintiffs could not establish that the underlying settlement was objectively reasonable, an essential element in the breach of contract claim pending against North River. (A85.) Because the success of North River's motion for summary judgment was necessarily dependent upon the success of its motion to preclude Plaintiffs' expert, the two motions and their supporting arguments were inextricably intertwined.

Plaintiffs objected to both motions, arguing that: 1) Faulkner used a proper methodology and had an adequate foundation for his opinion that the settlement was reasonable, and that cross-examination at trial was the proper means of testing such opinion; 2) Faulkner's opinion was based on a foundation broader in scope that what Rottner relied on to conclude the settlement was not reasonable; 3) North River's argument that the court should employ a Porter threshold analysis to determine admissibility lacked

merit; and 4) that expert testimony as to the reasonableness of the settlement was not required. (A97.) Plaintiffs' objection included uncontroverted evidence that, at the time he was deposed, Faulkner's opinion was based on his review of forty-five separate documents. (A99-103.) These documents included, but were by no means limited to, lengthy mediation papers prepared by all parties in the CNB Action (including Connecticut National Bank, Norwich Savings Society, the law firm of Brown Jacobson, P.C., Julius and Dora Rytman, and the Plaintiffs herein), deposition transcript excerpts from the parties taken during the CNB Action, deposition transcripts from Robert Kofkoff and Joseph Fortin in which both men offered cogent explanations as to why they settled the CNB Action, financial documents relating to the Rytman entities, and numerous other pertinent documents. (A99-103.) The trial court, Shapiro, J., heard oral argument on both motions on January 7, 2009. There was no evidentiary hearing.

On February 19, 2009, the trial court, Shapiro, J., simultaneously granted North River's motions to preclude and for summary judgment. (A21.) Based on the scheduling order then in place, trial was not scheduled to commence until July 6, 2009. (Am. Scheduling Order July 1, 2008.)

Plaintiffs subsequently filed five post- judgment motions, including motions to reargue the motions to preclude and for summary judgment, and motions to permit the amended disclosure of Faulkner and the late disclosure of Robert Kofkoff as an expert.[3]

On May 6, 2009, the court, Shapiro, J., denied all five motions. (Mem. of Decision May 6, 2009, Shapiro, J.) These issues were raised in Plaintiffs' initial appeal to the

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[3] See Mots. to Reargue/Reconsider, Nos. 251, 252, and 253, Mar. 12, 2009; Mot. for Ext. of Time Re: Scheduling Ord., No. 254, Mar. 23, 2009; Disclosure of Expert Witness, No. 256, Mar. 23, 2009; and Mot. to Open and Set Aside Judgment, No. 257, Mar. 24, 2009.

Appellate Court, wherein Plaintiffs argued that the trial court abused its discretion in denying these motions because (1) they did not seek a second bite of the apple and instead were relying on evidence already before the trial court; (2) they sought to correct the trial court's misapprehension of fact and law; and (3) permitting expert disclosure of plaintiff Robert Kofkoff, or permitting Plaintiffs to amend the disclosure of Faulkner, would not have prejudiced Defendants and would have been consistent with a well-established judicial preference for the resolution of a case on the merits. However, because the grant of cert in this case is limited to whether the Appellate Court properly affirmed the trial court's award of summary judgment, these issues are not briefed in this appeal.

On May 26, 2009, Plaintiffs appealed the February 19 and May 6, 2009 decisions of the trial court.[4] On June 1, 2009, North River filed a cross appeal, seeking review of Judge Quinn's April 6, 2005 decision granting Plaintiffs' motion for summary judgment on the issue of their duty to defend.[5] On January 1, 2013, the Appellate Court affirmed the rulings of the trial court. On February 14, 2013, this Court granted Plaintiffs' petition for cert as to the issue of whether "the Appellate Court properly affirm[ed] the trial court decision granting summary judgment in favor of the defendant North River Insurance Company?" (Order on Pet. for Cert, Feb. 14, 2013.) Additional facts will be set forth as necessary below.

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[4] Hartford chose not to join North River's Motion to Preclude or Motion for Summary Judgment. Instead, Hartford settled with the Plaintiffs, paying its policy limit of $500,000.

[5] North River's cross-appeal was a so-called "contingent" cross-appeal, seeking review of Judge Quinn's decision only in the event that Plaintiffs were able to prevail in the appeal seeking to overturn the court's, Shapiro, J., rulings. On February 28, 2013, North River filed Alternative Grounds for Affirmance, pursuant to Practice Book § 84-11; its first proffered alternative grounds for affirmance concerns the substance of its cross appeal: "[t]hat the trial court (Quinn, J.) improperly ruled that North River had a duty to defend." Pursuant to Practice Book § 67-3, Plaintiffs will respond to North River's cross appeal after North River briefs the same.

II. The trial court improperly granted Defendant's October 6, 2008 motion to preclude, which was inextricably intertwined with, and led to the improper granting of, Defendant's motion for summary judgment.

A. Standard of Review

The proper standard of review to be applied is contested and therefore merits some discussion. Pursuant to the ruling of the Connecticut Appellate Court in DiPietro v. Farmington Sports Arena, LLC, 123 Conn. App. 583 (2010),[6] a plenary standard of review should be applied to both the trial court's decision precluding Faulkner's expert testimony *and* its decision to grant summary judgment in North River's favor.

In DiPietro, the Appellate Court undertook a thorough analysis of the proper standard of review to be applied in cases where the admissibility of expert testimony is determined in connection with a motion for summary judgment. The court first acknowledged that "[o]rdinarily, a trial court's ruling on the admissibility of an expert's testimony at trial is subject to the deferential scope of review of abuse of discretion." DiPietro v. Farmington Sports Arena, LLC, supra, 123 Conn. App. at 610. However, the court held that "in connection with a summary judgment proceeding," the highly deferential abuse of discretion standard was wholly inappropriate. Id. at 611. Where determination on a motion to preclude an expert from testifying is inextricably intertwined with the

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[6] This Court reversed the Appellate Court's decision in DiPietro on the grounds that the plaintiffs had failed to produce any evidence showing that the defendants knew or should have known of the allegedly defective condition, and therefore no disputed issue of fact existed with respect to the plaintiffs' inability to prove notice. DiPietro v. Farmington Sports Arena, LLC, 306 Conn. 107, 124-25 (2012). The case was remanded to the Appellate Court with direction to affirm the trial court's judgment. Id. at 125. Notably, this Court did not reach the issue of whether "the Appellate Court properly rule[d] that plenary review applied to the trial court's decision concerning the admissibility of expert testimony in a summary judgment motion." Id. at 111, n. 2. Therefore, the Appellate Court's holding with respect to that issue remains intact.

determination on a motion for summary judgment, the court held that "it would be inconsistent with th[e] plenary scope of review [that applies to summary judgment proceedings] to subject a particular subset of the trial court's determinations in those proceedings, namely, the admissibility of an expert's opinion, to the highly deferential abuse of discretion scope of appellate review." Id. at 611.

Moreover, it is an axiom of summary judgment jurisprudence that the moving party "has the burden of showing the nonexistence of any issue of fact" and that "the evidence must be viewed in the light most favorable to the opponent." Ramirez v. Health Net of the Northeast, Inc., 285 Conn. 1, 10-11 (2008). The Appellate Court in DiPietro held that "it would be inconsistent with [these] well-settled principles...to subject the court's ruling on the admissibility of [an expert's] opinion to an abuse of discretion scope of review." DiPietro, supra, 123 Conn. App. at 11. The abuse of discretion standard is improper in this context because to apply that standard would assume that the trial court *had* the discretion to exclude the testimony in the first place. The DiPietro majority soundly rejected this proposition, holding that

> because the movant in a summary judgment proceeding has the burden to show that there is no genuine issue of fact and the facts are to be viewed in the light most favorable to the nonmoving party, a trial court in such a proceeding would be obligated to exercise its discretion in favor of the nonmoving party's offer of evidence

Id. at 611.

The court went on to hold that "in applying our plenary scope of review to the question of admissibility of [the non-moving party's expert's] testimony, the same considerations *compel us to resolve any doubts about that question in favor of admissibility.*" Id. (emphasis added). The same result should follow here as failure to

apply the plenary scope of review would improperly relieve the moving party of their burden to show the absence of any genuine issue of material fact.

In holding that a plenary scope of review applied, the court also distinguished Sherman v. Bristol Hospital, Inc., 79 Conn. App. 78 (2003). Sherman was a medical malpractice action in which the defendant physician moved *in limine* to preclude the plaintiff's expert from testifying as to the proper standard of care, breach of that standard by the defendant, and causation. Id. at 82. The parties agreed that if the defendant's motion were granted, the plaintiff could not maintain his action. Id. Accordingly, the trial court held a two-day evidentiary hearing, after which it concluded that the plaintiff's expert was not qualified to testify as to causation and precluded her from doing so. Id. at 82-83. *Subsequent* to this determination, the defendants moved for summary judgment, arguing that the plaintiff could not prove an essential element of his cause of action; the trial court agreed and granted the motion. Id. at 83. The DiPietro court acknowledged that it had "applied the highly deferential abuse of discretion scope of review to the trial court's evidentiary ruling," in that case, but that Sherman "was distinguishable because the ruling in the trial court was akin to a ruling at trial, *made on a full factual record, and not made during the course of a summary judgment proceeding.*" DiPietro, supra, 123 Conn. App. at 612 (emphasis added).

The same distinction applies in the instant appeal, as the ruling on the motion to preclude was made in the context of summary judgment proceedings rather than after an evidentiary hearing with the concomitant benefit of a full factual record. North River's motion to preclude was inextricably intertwined with its summary judgment

motion, as the latter depended on the success of the former.[7] Both motions were filed and argued simultaneously and the trial court conducted no separate trial-like evidentiary hearing. The trial court simultaneously addressed and granted both motions in the same memorandum of decision. In light of this, pursuant to the Connecticut Appellate Court's Ruling in DiPietro v. Farmington Sports Arena, LLC, 123 Conn. App. 583 (2010), a plenary scope of review must be applied to both the trial court's decision precluding Faulkner's expert testimony *and* its decision to grant summary judgment in North River's favor.

Judge Bishop's concurring opinion in DiPietro offers alternative grounds on which this Court could find plenary review to be proper. Judge Bishop argues that the court should "accord plenary review to the court's determination that [an expert] is not competent to testify, not on the basis that the court's evidentiary ruling should be accorded plenary review, but rather, because the court was legally incorrect in engaging in such an assessment when the evidence was in conflict." DiPietro, supra, 123 Conn. App. at 624 (Bishop, J., concurring). Judge Bishop concluded that the court had acted *beyond* its scope of authority, and therefore the question was no longer whether the court had abused its discretion- the court *had no discretion* to exclude the testimony of the expert. Id. at 624-25. The context in which the ruling was made- summary judgment proceedings- mandated that any doubt be resolved in favor of the non-movant. Judge Bishop argued "the [trial] court improperly resolved a factual dispute rather than confining itself to whether such a dispute exists so as to survive summary judgment." Similarly, should this Court elect not to apply plenary

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[7] North River itself was aware that success on the motion for summary judgment depended upon successfully precluding Faulkner. (A91.)

review to the determination that an expert's testimony is inadmissible in the context of a summary judgment proceeding, it can reach the same result by following Judge Bishop's well-reasoned concurrence.

B. Doubts as to sufficiency of the factual foundation go to weight, not admissibility and an adequate factual foundation may be established as late as the time of trial.

The trial court improperly concluded that Faulkner lacked an adequate foundation for his opinion that Plaintiffs' 2002 settlement was objectively reasonable.[8] The general standard for determining admissibility of expert testimony is "simply that the expert must demonstrate a special skill or knowledge beyond the ken of the average juror that, as properly applied, would be helpful to the determination of an ultimate issue." DiPietro, 123 Conn. App at 613. Once this low threshold question of "usefulness to the jury" has been satisfied, any questions regarding the expert's testimony properly *go to the weight, and not the admissibility,* of his testimony." Id. (emphasis added). If "any reasonable qualifications can be established, the objection goes to the weight rather than the admissibility" of the expert's opinion. Sanderson v. Bob's Coaster Corp., 133 Conn. 677, 682 (1947).

C. Faulkner's opinion was based on an adequate foundation

Plaintiffs acknowledge that pursuant to Section 7-4(a) of the Connecticut Code of Evidence, "in order to render an expert opinion the witness must be qualified to do so and

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[8] North River did not challenge Faulkner's qualifications to testify as an expert concerning the reasonableness of the Plaintiffs' Settlement, nor did the trial court conclude that Faulkner lacked the requisite qualifications. Neither does North River challenge Faulkner's selected methodology; rather, they argue he failed to "follow his own rules" and that this failure requires preclusion under Porter. (North River Appellee Br. 21-22, Apr. 1, 2011.) Because the trial court concluded that Faulkner lacked an adequate foundation, it did not address North River's argument that a Porter analysis must be utilized to consider Faulkner's testimony. Therefore, while Plaintiffs maintain that North River's Porter argument lacked merit, there is no need to address the same in this brief.

there must be a factual basis for the opinion." Chebro v. Audette, 138 Conn. App. 278, 288 (2012); see also Conn. Code Evid. § 7-4(b) (A297-98) ("facts...upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding;" facts upon which expert relies need not be admissible if of the type customarily relied upon by experts in the field). The Appellate Court has noted that our Code of Evidence incorporates the common law standard that "there is no rule of law declaring the precise facts which must be proved before his opinion may be received in evidence. DiPietro, supra, 123 Conn. at 614, citing Conn. Code Evid. § 7-4(a), (A297).

Though there is no bright-line rule establishing the precise facts that must be proven, the Official Commentary to Section 7-4 of the Code of Evidence identifies three broad sources of facts upon which an expert may base his opinion. First, he may base his opinion on "facts 'perceived' *at or before trial*..." Commentary, Conn. Code Evid. § 7-4 (A297-98), citing State v. Conroy, 194 Conn. 623, 628-29 (1984). Second, an expert may base his opinion "on facts 'made known' to him at trial. This...includes facts the expert learns of when [he] attends the trial and listens to the testimony of other witnesses prior to rendering his own opinion." Id., citing DiBiase v. Garnsey, 106 Conn. 86, 89 (1927). And third, "an expert's opinion may be based on facts made known to him *before trial* and of which the expert has *no firsthand knowledge.*" Id., citing State v. Gonzalez, 206 Conn. 391, 405 (1988) (emphasis added); see also Viera v. Cohen, 283 Conn. App. 412, 444 (2007) (expert may develop a proper foundation for his opinion at trial through testimony heard at the proceeding and/or through hypothetical questions presented to expert at trial

No serious challenge to Faulkner's professional qualifications has been raised (A4, A14, A98); thus, any objections as to factual foundation properly go to weight rather than

admissibility. See, e.g. Chebro v. Audette, supra, 138 Conn. App. at 289 (holding that where professional qualifications of expert surveyor were undisputed, objections as to whether he was qualified to testify due to lack of firsthand knowledge went to admissibility).

Under our Code of Evidence and the standards set forth in DiPietro, Faulkner's opinion testimony clearly rested on a sufficient and permissible factual basis, and was therefore admissible in this context. DiPietro and Section 7-4(a) remind us "there is no rule of law declaring the precise facts which must be proved before [an expert's] opinion may be received in evidence." DiPietro, supra, 123 Conn. App. at 614; (A297.)

Faulkner's deposition testimony was consistent with the contents of his expert disclosure. Specifically, he testified that (1) Plaintiffs settled the CNB litigation for a reasonable amount via a process that was free from collusion, fraud or bad faith; (2) said settlement process was reasonable, managed by experienced mediators and resulted in a reasonable settlement amount; and (3) the basis on which Robert Kofkoff settled the CNB litigation and analysis he employed were reasonable, rationale, logical, founded on facts as he understood them at the time, and performed in good faith. (A153, A158, A160, A164, A166, A171-76, A178-80, A182-83, A185-88, A194-95, A201, A204, A208, A210.)

Furthermore, Faulkner acknowledged that although on the day of his deposition he may not have been able to recall each and every one of the many documents he reviewed in forming his opinion, he nevertheless had indeed reviewed the entire contents of the box and based his opinion on the contents. (A206-07.) This plainly refutes the assertions of both Defendant and the trial court that "prior to reaching his opinions, [Faulkner] reviewed no documents from the underlying cases other than the position papers." (A8.)

In denying Plaintiffs' post-judgment motions, the trial court criticized Plaintiffs for not having provided it with numerous documents "which could have been presented at the time of the original argument," characterizing this as a "second bite of the apple." (Mem. of Decision, May 6, 2009.) Most respectfully, the trial court is mistaken.

Plaintiffs disclosed and identified to the trial court (Shapiro, J.) all documents reviewed by Faulkner in developing his expert opinion about the reasonableness of the underlying settlement in the CNB action- the contents of the banker's box to which Faulkner referred in his deposition. (A206-07, A99-103.) The trial court had available to review many of the documents contained in the box before deciding North River's motions to preclude and for summary judgment, including the entire deposition transcript for Faulkner, as they had been provided to the court by North River, the Hartford, or Plaintiffs themselves in connection with the summary judgment and preclusion motions.[9] The trial court also had

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9 In its motion to preclude filed October 6, 2008, North River included the following exhibits, among others: Dale Faulkner Deposition June 10 and June 13, 2008 (complete) (North River Mot. to Preclude, Exh. B) (A151); Mutual Release, Sept. 11, 2002 (Id., Exh. C)(A287). Plaintiffs' objection to North River's motion to preclude, (A97), included the following exhibits: Kofkoffs' Mediation Statement, Mar. 13, 2002 (Pltfs. Obj. to North River's Mot to Preclude, Exh. 3); Kofkoffs' Mediation Statement, Oct. 23, 1998 (Id., Exh. 4); Joseph Fortin Deposition, Nov. 19, 1991 (excerpts) (Id., Exh. 18); and Robert Kofkoff Deposition, Nov. 26, 1991 (excerpts) (Id., Exh. 20). The Hartford, which filed for summary judgment on October 6, 2008, the same day as North River, included the following exhibits, among others, with its motion and accompanying memorandum of law: Joseph Fortin Deposition, Oct. 11, 2007 (excerpts) (Hartford Mot. for Summ. J. Exh. 2); Robert Kofkoff Deposition, Oct. 12, 2007 (excerpts) (Id., Exh. 3) (A211); and the Position Paper of Julius Rytman, et al, Mar. 14, 2002 (Id., Exh. 35). Plaintiffs' objection to North River's motion for summary judgment included the following exhibits: Rytman Mediation Paper, Sept. 25, 1998 (Pltfs. Obj. to Hartford's Mot. for Summ. J., Exh. 18); excerpts from depositions of Julius Rytman dated May 17, 1989 (Id., Exh. 6) (A245), Dec. 12, 1989 (Id., Exh. 7) (A249), Dec. 20, 1990 (Id., Exh. 8) (A252), Dec. 21, 1990 (Id., Exh. 9) (A270), Mar. 22, 1991 (Id., Exh. 10) (A279), May 15, 1992 (Id., Exh. 11) (A281); Rytman's Description of the Case, February 1993 (Id., Exh. 17); and Deposition of Gasper Kuhn, Oct. 24, 2007 (excerpts) (Id., Exh. 2). The trial court, Shapiro, J., heard all motions and objections contemporaneously and ruled on all

available to review other material, the contents of which bolstered Plaintiffs' claim that Faulkner had an adequate foundation on which to render his expert opinions.[10]

Due to the extremely voluminous nature of the forty-five documents in Faulkner's file, Plaintiffs offered to make available to the trial court any of the documents not already submitted- the Shared Documents- if the court so desired, a proffer the trial court rejected. (A108.) Nonetheless, even if the Court considered only the Shared Documents already before it, and none of the other forty-five documents referenced in footnote 4 of Plaintiffs' objection to North River's motion to preclude, the contents of these Shared Documents alone established that Faulkner had an adequate factual foundation for his opinion about the reasonableness of the underlying settlement in the CNB action, mindful that Faulkner's file contained forty-five documents that he reviewed.

1. Facts established by the Shared Documents supported Faulkner's foundation

By reviewing the contents of the Shared Documents on which Faulkner relied and which the trial court had before it when deciding North River's motions to preclude and for summary judgment, it becomes clear that Faulkner's factual foundation was adequate.

For example, included in the Shared Documents were four detailed mediation

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motions and objections at the same time. These documents will be collectively referred to hereinafter as the "Shared Documents."

10 This material included the following exhibits: Faulkner's CV (Pltfs.' Obj. to Def. North River's Mot. to Preclude, Exh. 1); Joel Rottner Deposition (excerpts) (Id., Exh. 6) (A226); Expert Disclosure of Joel Rottner (Id., Exh. 7) (A47), Robinson & Cole Litigation Report, April 2001 (Id., Exh. 8), Robinson & Cole Letter Report , October 18, 2001 (Id., Exh. 9); Town of Franklin v. Rytman decision, Hodgson, J. (Id., Exh. 10) (A294); Mutual Release, September 11, 2002 (Dft. North River Mot. to Preclude, Exh. C) (A287); and Dina Fisher Deposition (excerpts) (Dft. Hartford's Mot for Summ. J., Exh. 9). This material was not included in Faulkner's file, but was reviewed by Judge Shapiro and is referenced to address the underpinnings of Judge Shapiro's decision to preclude Faulkner's testimony

position papers submitted by Plaintiffs and Rytman.[11] These mediation papers included counsels' detailed analysis of the factual and legal issues, referenced testimony from significant fact and expert witnesses and incorporated a comprehensive examination of all Rytman's damage claims.

Furthermore, both Faulkner and the trial court reviewed portions of plaintiff Robert Kofkoff's deposition dated October 12, 2007.[12] Mr. Kofkoff, a licensed attorney and one of the third-party defendants cited into the Rytman foreclosure action, witnessed the circumstances giving rise to the allegations made by Rytman in the CNB action. Moreover, he possessed the legal expertise to comprehend his exposure. He noted there existed an opportunity in September 2002 to settle the CNB case for $3,150,000, an amount he concluded was reasonable.[13] (A212.) Mr. Kofkoff also detailed the relationship that existed between Rytman, the Kofkoff entities, Connecticut National Bank and the Brown Jacobsen law firm from October 1984 through October 1987. (A213-25.) He discussed how Samuel Kofkoff, his father and business partner, voiced concerns about Rytman's finances at a CNB Advisory Board meeting in October 1984. (A213-15.) He heard Rytman complain how CNB, after that Advisory Board meeting, controlled his accounts, money and business. He remembered how Rytman accused his father of conspiring with Rytman's lawyer and bank to steal his chicken, feed and egg empire. (A215-20.)

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[11] Kofkoffs' Mediation Paper, March 13, 2002 (45 pages) (Pltfs.' Obj. to Dft. North River's Mot to Preclude, Exh. 3); Kofkoff Mediation Statement, October 23, 1998 (45 pages) (Id., Exh. 4); Rytman Description of the Case, February 1993 (18 pages) (Pltfs.' Obj. to Dft. Hartford's Mot. for Summ. J., Exh. 17); and Rytmans' Position Paper, Mar. 14, 2002 (52 pages) (Dft. Hartford's Mot for Summ. J., Exh. 35).

[12] Faulkner read the entire transcript; the trial court had access to pages 69 and 139-151.

[13] Significantly, Mr. Kofkoff made no reference to the six other cases North River claims (a) were part of this monetary settlement, (b) necessarily included some consideration relative to the settlement amount and (c) about which Faulkner knew nothing.

Mr. Kofkoff was concerned that both Julius Rytman and his wife Dora would make compelling witnesses and would engender sympathy and favor from a jury. (A220-25.) He worried that Dora Rytman, an articulate and sympathetic person, could eloquently and credibly convey how she and her husband survived the Holocaust, emigrated to America, and created a thriving business enterprise, and how over the course of three years their best friend, Samuel Kofkoff, their lawyer, Milton Jacobsen and their bank, Connecticut National Bank, conspired to, and did indeed, steal their business. (A216, A223.) As to Mr. Rytman, Mr. Kofkoff worried that a jury would find compelling his claims that he had experienced renewed nightmares about the Holocaust and how he equated Samuel Kofkoff's betrayal to how he was treated by the Nazis. (A220-25.)

Faulkner and the trial court also reviewed excerpts from several depositions of Julius Rytman.[14] (A245-86.) Rytman discussed Samuel Kofkoff's comments to the CNB Advisory Board, the fraud investigation CNB conducted after receiving the elder Kofkoff's comments about Rytman's financial status, the financial viability of his business before CNB took control of his accounts and dictated what creditors would be paid, and the alleged conspiracy by Samuel and Robert Kofkoff and Joseph Fortin to destroy him. (A250, 253-59, A264-65, A26-69, A273, A278, A280-86.)

In short, based on what Faulkner reviewed and what the trial court had before it in the form of the Shared Documents, there was ample evidence to establish that Faulkner had an adequate factual foundation within the meaning of Sections 7-4(a) and (b) of the Code of Evidence. At a bare minimum, the factual foundation established by Faulkner at his deposition was sufficient to create significant doubt as to North River's assertion that he

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[14] These depositions are identified at supra, n. 9, and were submitted with Plaintiffs' objection to the defendant Hartford's motion for summary judgment.

lacked an adequate factual foundation. Because the trial court ruled his opinion inadmissible in the context of a summary judgment proceeding, it was required to resolve these doubts in favor of Plaintiffs, the non-movant. Its failure to do so is reversible error.

2. Faulkner was permitted to supplement his opinion up to the time of his trial testimony

The trial court's summary judgment ruling essentially amounted to a finding that, without an expert to testify *at trial*, Plaintiffs would be unable to prove the objective reasonableness of the settlement at trial. But even if the factual foundation were found to be lacking at the time of his discovery deposition, under Section 7-4 of the Code of Evidence, he could have supplemented his opinion up to the moment he testified at trial. He could have even testified in the form of a response to a hypothetical question incorporating the critical facts of the underlying case. In contravention of these well-established principles, the trial court arbitrarily limited its examination of Faulkner's factual foundation to those materials Faulkner reviewed in forming his preliminary opinions based in February of 2008, five months prior to his deposition in June of 2008.[15] (A19.) The

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[15] During Faulkner's deposition, North River's counsel asked him about the factual foundation for his opinions based on information Faulkner had reviewed as of February 2008, five months prior to his deposition, and Faulkner's answer was responsive only to that that artificially restricted time period. (A159.) Counsel's interrogation resulted from Faulkner's response on the previous page of his deposition transcript:

> Q: And you then reach that opinion with regard to that reasonable amount by review of the mediation statements, correct?
>
> Mr. Auger: Objection to form.
>
> Mr. Danaher: What's the form?
>
> Mr. Auger: Only to the extent that the question assumes the scope of his review was limited to the mediation statements.
>
> Q: Well –
>
> A. The answer to your question, putting aside Mr. Auger's objection, would be no, it was not limited to those things. It was limited to – I mean, it encompassed or was a result of my review of all of the materials that I did review. (A157.)

discussion above reveals that the scope of Faulkner's foundational material at the time of the deposition was far broader than North River claims, and far broader than the trial court found. Moreover, it would have been entirely permissible for Faulkner to review and rely upon additional materials up to the time of trial, making the trial court's arbitrary limitations all the more erroneous. Instead, the trial court's impermissible restriction of the scope of Faulkner's factual foundation to those materials reviewed as of February 2008 prevented it from ascertaining accurately the factual foundation that supports Faulkner's opinion.

Faulkner's preclusion took place in the context of a motion for summary judgment and was inextricably intertwined with same; the preclusion led almost inevitably to the summary judgment. Accordingly, pursuant to bedrock principles of summary judgment, in considering this motion that factored so heavily into its determination of Defendant North River's summary judgment motion, the trial court was obligated to view the evidence in a light most favorable to Plaintiffs, the non-movants. Furthermore, after the threshold showing of Faulkner's professional qualifications had been made, the trial court was required to resolve any doubts in favor of Faulkner's admissibility. DiPietro, 123 Conn. App. at 610-11.

An objective review of Faulkner's testimony suggests that his performance during the deposition may not have been his best. Faulkner acknowledged, "to the extent that [his] memory [during the deposition] might not have captured all the information contained in the box, it [is] true nonetheless that [his] opinions are based on the information contained in the box." (A206-07.) But longstanding summary judgment jurisprudence, coupled with the standard set forth in DiPietro, compelled the trial court to accept, for purposes of

deciding the summary judgment motion, Faulkner's sworn- and unrefuted- testimony that his opinions were based on his review of all 45 documents in his file, many of which the trial court already had before it. See supra, n. 9; (A206; A99-103.)

Instead, the trial court improperly relied on limited and disputed evidence to preclude Faulkner's testimony in granting the motions to preclude and for summary judgment.[16]

D. Faulkner relied on information customarily relied upon by experts in the field

Under Section 7-4(b) of the Code of Evidence, an expert may base his opinion on facts known or made known to him at or before the proceeding. These facts need not be admissible if of the type customarily relied upon by experts in that particular field in forming an opinion on the subject matter. Conn. Code Evid. § 7-4(b). Faulkner relied on information other experts in the field customarily rely on in determining the reasonableness of a settlement and therefore the trial court erroneously held that the issue of whether Rottner's opinions are based on sufficient facts was immaterial to the issue of whether Faulkner's testimony was admissible. (A13.)

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[16] The trial court found that "since expert depositions have been completed and trial is approaching, adjudication of this motion at this juncture is appropriate." (A7.) The court's finding that adjudication of North River's motion to preclude at this early stage, immediately following the the conclusion of the expert depositions, reinforces Plaintiffs' position that the scope and breadth of the factual foundation on which Faulkner relied to render his opinions should be determined, at the earliest, as of the time he was deposed, not at an arbitrary prior point in time. A party is not bound by the initial opinions stated in his expert disclosure, required under Practice Book Section 13-4. Indeed, experts routinely review additional material after forming their initial opinions. The additional review may change, modify or reinforce those initial opinions. This temporally evolving nature of discovery is why parties have a continuing duty to disclose. See, e.g., Practice Book § 13-15. See also DiPietro, 123 Conn. App. at 613-14; supra Section II.B and II.C (experts may supplement their opinions up to the time of trial and may even testify in the form of a hypothetical at trial); Viera v. Cohen, 283 Conn. App. 412, 444 (2007) (expert may develop a proper foundation for his opinion at trial through testimony heard at the proceeding and/or through hypothetical questions presented to expert at trial); Conn. Code Evid. § 7-4.

North River disclosed Joel Rottner, Esq. as an expert witness to testify about the reasonableness of Plaintiffs' settlement amount in the CNB action. North River's written disclosure of Rottner indicates that he intended to testify that "one way to evaluate the evidence is to read the entire file in the underlying case." (A47-48.) Rottner quickly concluded that a review of the entire file in this case would be unduly burdensome; the CNB file created by Robinson & Cole, Plaintiffs' attorney in the underlying action, included 130 banker's boxes of documents. (A48.) Instead, Rottner determined he could assess the reasonableness of the settlement amount by evaluating the opinions of the professionals who worked the case daily. (A48.) Rottner admitted he relied primarily on Robinson & Cole's "Initial Strategy Report and Proposed Budget" and that firm's letter report to develop his relevant opinions. (A48-49, A231-40.) Rottner relied heavily on the opinions articulated by Robinson & Cole lawyers in developing his own opinions about the reasonableness of the settlement amount in the CNB action. He admitted that the "Robinson & Cole report really was the key to understanding the settlement value of this case..." (A231-33.)[17]

As discussed above in Section II.C., Faulkner relied on far more than mediation statements.[18] However, even assuming that the mediation statements represented the entire basis for his opinion, Rottner's expert disclosure as well as his deposition testimony

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[17] Robinson & Cole represented these Plaintiffs in the CNB Action, Robinson & Cole. The content of the October 18, 2001 letter report mirrors that of the April 2001 litigation report.

[18] In addition to the materials referenced supra at n. 9, Faulkner reviewed the mediation papers of all parties in the CNB action, including the CNB and Norwich Savings Society Position Paper, October 23, 1998 (20 pages) and the Brown Jacobsen Law Firm mediation submission, October 26, 1998 (26 pages, including additional exhibits A – T totaling 59 pages of documents concerning the Rytmans' financial status and relationship with the Brown Jacobsen Law Firm). In short, Faulkner read comprehensive mediation statements submitted by all parties in the underlying action totaling 265 pages of competing analysis of the liability and damage claims and defenses asserted by all parties. (A99-103.)

are persuasive evidence that Faulkner need not have relied on any other evidence. It is undisputed that Rottner has significant experience litigating insurance coverage claims and is considered an expert in the field of insurance settlements. See infra, n. 25. Therefore, the types of information sources and facts upon which he relied in arriving at his opinion regarding the objective reasonableness of the settlement in this matter are perhaps the best evidence of precisely what experts in this field customarily rely upon.

Despite Defendant's argument to the contrary, Rottner's reliance on the strategy report and letters authored by counsel are comparable to Faulkner's reliance on mediation statements. The content of these reports mirror that of the many mediation statements and position papers authored by counsel and reviewed by Faulkner.[19] It is clear from even a cursory review of the Rottner Disclosure that Rottner relies greatly on Robinson & Cole's representations and conclusions to arrive at most of his opinions in this case.

From Rottner's disclosure and deposition testimony, it is evident that Faulkner relied on information customarily relied on by experts in this field. In fact, the documentation that Rottner relied on in developing his opinion was far more limited in scope than that relied on by Faulkner. Even Rottner testified that, admittedly, "the client always has a better understanding of the facts because he lived it...I don't think a lawyer can ever have the understanding of the facts that the client has." (A230.) Nevertheless, Faulkner's documentary review shows that, to the extent it was possible, he closed the gap between his factual knowledge and that of the parties who had lived all of the underlying events.

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[19] Rottner attempts to distinguish the litigation strategy reports he reviewed from the position papers reviewed by Faulkner by claiming that the former are "objective and are not meant to persuade your client..." and included information as to the weaknesses of the client's case. (A228-29) However, Rottner offered no convincing reason why a similar overview of the strengths and weaknesses of both parties' cases could not be gleaned from a review of multiple mediation statements *by both parties*.

Faulkner, unlike Rottner, reviewed the sworn testimony of Robert Kofkoff, Joseph Fortin (Kofkoff partner), Samuel Kofkoff, Arthur R. Beaman, III (CNB official), Thomas Gardner (CNB official), and Julius Rytman, all direct participants in the events that comprise that factual foundation for Rytman's claim that Kofkoff, CNB and Brown Jacobsen conspired to steal his business. (A154-56, A162-63, A165.) Faulkner relied not just on the mediation statements, but also on the sworn testimony of the principal players in the CNB action. There can be no doubt that Faulkner's factual foundation rested upon his review of material customarily relied upon by experts in his field, and more. Therefore, the factual foundation should be found to be sufficient.

E. The trial court improperly found that certain facts were essential to developing an opinion on the reasonableness of the 2002 settlement and resolved genuine disputes about such facts in favor of North River

The trial court erred in resolving a genuine issue of material fact as to the reasonableness of Faulkner's factual foundation when it identified *and resolved in the moving party's favor* certain essential issues of fact of which it claimed Faulkner was unaware. This Court has held that

> [w]here the factual basis of an opinion is challenged the question before the court is whether the uncertainties in the essential facts on which the opinion is predicated are such as to make an opinion based on them without substantial value. ...The question is not whether the opinion would be more or less persuasive depending on the presence or absence of a given fact but rather whether the missing fact is such an essential part of the factual foundation for the opinion that its absence would rob the opinion of its persuasive force.

(Internal citations omitted.) State v. Asherman, 193 Conn. 695, 716-17 (1984), cert. denied, 470 U.S. 1050 (1985). Moreover, "the question of whether a sufficient foundation was laid

is a factual question for the court." (Citation omitted) Liskiewicz v. Leblanc, 5 Conn.App. 136, 141, 497 A.2d 86 (1985).

In DiPietro, the trial court considered the sufficiency of an expert's factual foundation. That case involved a twelve-year-old girl who was injured while playing soccer at the defendants' indoor soccer facility when her foot allegedly stuck to the carpeted playing surface, causing her to fall. DiPietro, supra, 123 Conn. App. at 604-05. The plaintiffs disclosed Benno Nigg, a professor of biomechanics, as an expert to opine that, *inter alia*, the carpet utilized by the soccer facility was unreasonably dangerous for an indoor facility, and was a substantial factor in causing plaintiff's injury. Id. at 614. The trial court excluded Nigg's testimony and granted summary judgment, holding that Nigg lacked personal knowledge as to certain essential facts that the trial court deemed necessary to an adequate foundation for his opinion.[20]

On appeal, the Appellate Court held that there was no doubt as to Nigg's professional qualifications. Id. at 614; see Sanderson v. Bob's Coaster Corp., supra, 133 Conn. at 682. Having resolved that threshold question, the Appellate Court then held that the information that Nigg *did* have satisfied the standards of Sections 7-4 of our Code of Evidence and that any unfamiliarity with the facts the defendant alleged to be essential

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[20] The trial court determined that "Nigg lacked personal knowledge of the essential facts of the case because he had not spoken with the plaintiff, Michelle, her father, who had witnessed her fall, or her coach; he had not examined Michelle's deposition or medical records when he issued his report; he had no information related to environmental conditions, the age or use of the facility, the frequencies of injury, the fit of her shoes, her soccer position, the place of injury, or what Michelle was doing at the time of injury to gain a complete understanding of the biomechanics of the accident." Id. at 609. Therefore, the trial court "found 'that Nigg does not have the personal knowledge about this case that would allow him to render an opinion with substantial value.' This last finding appears to be a determination that, despite the court's earlier assumption, Nigg's testimony would not be admissible at trial.'" Id.

went to the weight, not the admissibility, of his testimony. DiPietro, supra, 123 Conn. at 614-15 (emphasis added). The court held that "Nigg's entire testimony ... was admissible for purposes of the summary judgment proceeding," id. at 614. In so holding, the court soundly rejected the defendant's argument that "the absence of Nigg's personal familiarity with these facts rendered his opinion without substantial value. Id. at 615; see supra, n. 20 (identifying facts the defendant in DiPietro claimed to be essential).

In the instant case, the trial court precluded Faulkner's testimony because he allegedly lacked knowledge about certain facts that North River argued, and the trial court assumed, were "essential" to a factual foundation as to the issue of the reasonableness of the 2002 settlement. The allegedly essential facts of which Faulkner was unaware included (1) whether statements Samuel Kofkoff allegedly made to CNB officials at the CNB Advisory Board meeting in October 1984 were truthful, (A9); (2) the existence of the September 11, 2002 Mutual Release Agreement, which memorialized the settlement of the CNB action, and how much of the consideration paid for that release was allocated to the settlement of the claims made in the CNB action versus other claims referenced in the release, (A10-12); and (3) Joseph Fortin's comment, at some point during the CNB action, describing the litigation as a "joke." (A12.) Because it found that Faulkner was unaware of these "essential" facts in arriving at his opinion, the trial court determined his opinion had no "substantial value" as to whether the 2002 settlement was reasonable. (A5-6, A13-14.)

As to the first allegedly essential fact, Faulkner acquired his factual basis concerning the truthfulness of Samuel Kofkoff's statements to the CNB Advisory Board from his review of the deposition testimony of Robert Kofkoff, Samuel Kofkoff and Julius Rytman, in addition to reading all the mediation statements. Not surprisingly, there was conflicting

testimony as to the veracity of Samuel Kofkoff's statements to the CNB Advisory Board. Nonetheless, Faulkner considered these conflicts when analyzing the liability and damage factors and performing a risk analysis relative to the exposure the Kofkoffs faced in the CNB Action. (A161, A164, A166-69, A177, A179, A194, A208-09.)

In this context, the proper inquiry is not whether Faulkner was able to determine conclusively the veracity of Samuel Kofkoff's alleged 1984 statements to the CNB Advisory Board. Under this Court's standards for evaluating objective reasonableness, it is *not* essential that an expert predict in his deposition, months before trial, how a certain issue would have been determined at trial. Rather, it is sufficient that he evaluate the strengths of each party's argument in order to form an opinion as to which party was likely to prevail on this issue. Black v. Goodwin, Loomis and Britton, Inc., supra, 239 Conn. at 160 (insured need not establish actual liability). Faulkner did so by evaluating the competing evidence concerning those statements. (A155-56, A163, A167-70, A175, A177, A178-85, A189-92, A196-97, A199-201, A205-09.)

As to the second allegedly "essential fact" of which Faulkner was unaware, the existence of the Mutual Release, (A287), Plaintiffs acknowledge that Faulkner did not review the Mutual Release before developing his preliminary opinions. Rather, Faulkner correctly assumed, based on his review of Robert Kofkoff's deposition testimony, there was no allocation of settlement monies to the non-CNB cases referenced in the mutual release.[21] (A203.) Significantly, North River provided the trial court with no evidence

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[21] The language included in the Release relative to these cases demonstrates that the parties were trying to capture all possible claims that ever existed between them into one release, i.e., performing standard housekeeping functions at the end of the case. The Release provides "[m]ore particularly, *but not by way of limitation*, this Scope of Release includes any and all claims that arise out of or may have arisen out of or related to a certain

indicating there was an allocation of settlement monies to any of these other six cases.[22] To the contrary, neither the Rytman nor Kofkoff mediation statements presented to, and presumably reviewed by, the trial court include any damage claims based on these actions. Instead, they demonstrate conclusively that Rytmans' damage claims related exclusively to the CNB action.[23] Even Rottner acknowledged that he had no knowledge of these six cases and did not believe that Robinson & Cole's report had even mentioned them. (A238.)

Whether the existence of the mutual release is essential is certainly in dispute; even assuming that it is essential, Faulkner's alleged ignorance of this document is also disputed. Nevertheless, the trial court not only identified it as an "essential" fact; it *resolved* a dispute as to Faulkner's awareness of the document in favor of the moving party in contravention of bedrock summary judgment jurisprudence requiring a trial court to view all evidence in the light most favorable to the non-movant.

The third so-called "essential" fact, Mr. Fortin's alleged reference to the CNB Action as "a joke," is irrelevant and cannot be considered a fact essential to Faulkner's foundation. It is difficult to comprehend how Faulkner's alleged unawareness of one out-of-context comment, made by one frustrated litigant in the course of nearly fifteen years' worth of litigation, with no further explanation offered by either North River or the trial court, can be

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civil action known as Connecticut National Bank..." (A287.) When listing the other six cases, the Release includes expansive language, i.e., "which include but are not limited to the following..." (A288.) The exclusive focus of the parties at the September 2002 mediation was to resolve the CNB action and leave no loose ends; the loose ends, however, had nominal value, if any.

[22] The Town of Franklin case were tax appeals in which Rytman impleaded the Kofkoffs to defend against foreclosure. Another case, Rytman v. Colchester Foods, had settled long before the CNB action resolved. (A294-95.)

[23] Defendant's argument is especially misleading in light of the common-sense conclusion that if a portion of the $3.15 million settlement amount were apportioned to any of the other six cases mentioned, then Plaintiffs would have, in effect, settled the CNB action for *less* than $3.15 million, an amount Faulkner deemed reasonable.

deemed an "essential" fact without which his opinion had "no substantial value." Mr. Fortin contributed his own monies towards the $3,150,000 settlement in the CNB action. That settlement amount was not "nuisance value." Robert Kofkoff's testimony about his exposure and why he settled the CNB action for $3,150,000 belies any inference that Fortin, by his comment, thought his exposure was nominal. (A211-25.)

Far from being essential, the issues of the mutual release and Fortin's use of the word "joke" are inflammatory red herrings planted by North River and have no bearing on whether the settlement was objectively reasonable as this Court has established in Black. North River provided no evidence to demonstrate the relevance of either topic to the analysis of what constitutes a reasonable settlement. In contrast, Plaintiffs provided the trial court with rebuttal evidence refuting that these were "essential facts" without which Faulkner's opinion has no "substantial value". Moreover, Plaintiffs offered evidence establishing that Faulkner did indeed consider some of these facts, e.g., the factual circumstances surrounding Samuel Kofkoff's statements at the CNB Advisory Board meeting and Robert Kofkoff's belief that there was no allocation of settlement funds to the other six cases. Nevertheless, the trial court improperly resolved these disputed facts, which it found to be essential to a factual foundation, in favor of North River, acting beyond its authority when adjudicating a summary judgment matter.

Respectfully, the result here should mirror the result in DiPietro, which is materially indistinguishable. Like the expert's opinion in DiPietro, Faulkner's factual foundation, which included his review of the 45 documents in the aforementioned banker's box, as well as his own skills, training and experience, was sufficient and satisfied the requirements of the Code of Evidence and this state's jurisprudence regarding expert testimony.

These three facts identified by the trial court are not essential. At worst, Faulkner's alleged lack of knowledge as to these facts arguably could have rendered his opinion less persuasive than it might otherwise be. See State v. Asherman, supra, 193 Conn. at 716-17. However, his alleged lack of knowledge as to these facts at the time of his discovery deposition certainly did not rise to the level of rendering his opinion "without substantial value" and thus requiring preclusion. See id. After having established the threshold professional qualification, the trial court was compelled by Sanderson and longstanding summary judgment jurisprudence to resolve any doubts about Faulkner's testimony in favor of admissibility, with questions as to the factual foundation going to the weight and not the admissibility of Faulkner's testimony. See Sanderson, supra, 133 Conn. at 682 (if reasonable qualifications have been established, objections go to weight, not admissibility). Instead, the trial court first resolved each of the disputed, allegedly "essential" facts in favor of the movant, North River, and then proceeded to resolve the overarching factual issue of the adequacy of Faulkner's foundation in favor of North River as well. The trial court acted beyond the scope of its authority and discretion in the context of a summary judgment proceeding.

F. Faulkner's opinion was fully admissible

When a party seeks reimbursement from an insurer who has wrongfully breached its duty to defend, this Court has delineated the proper standards used to determine the reasonableness of a settlement: "In determining whether a settlement is reasonable, the jury is entitled to consider not only the damage sustained by the injured party, but also the likelihood that the injured party would have succeeded in establishing the insured's liability." Black v. Goodwin, Loomis and Britton, Inc., 239 Conn. 144, 160 (1996). Moreover,

> In order to recover the amount of the settlement from the insurer, the insured need not establish actual liability to the party with whom it has settled 'so long as ... a potential liability on the facts known to the [insured is] shown to exist, culminating in a settlement in *an amount reasonable in view of the size of possible recovery and degree of probability of [a] claimant's success against the [insured].*' ... Accordingly, the strength of the plaintiff's case is a factor that the jury may consider in deciding whether the settlement is reasonable.

(Internal citations omitted; Emphasis in original). Id. at 160.

This Court in Black also cited with approval the jury charge used by the trial court to evaluate the reasonableness of a settlement. Id. at 161.[24, 25]

Based on the Shared Documents and the other documents he considered, as discussed above, Faulkner evaluated a blend of liability and damage factors and performed a risk analysis relative to the exposure the Kofkoffs faced in the CNB Action. (A161, A164-69, A177, A179, A194, A208-09.) He weighed the various claims and determined where the exposure lay. (A178-79.) It appeared to Faulkner that Samuel Kofkoff's conduct was such that Rytman's attorney in the CNB Action could potentially demonstrate that such conduct was a substantial factor in causing the claimed damages. (A202.) He believed a competent plaintiff's counsel could indeed develop those facts and prevail on the claims. (A202.) After reviewing all of the 45 documents, Faulkner determined that neither side could comfortably be assured of succeeding in the underlying CNB Action. (A183.) Thus,

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[24] The jury charge read as follows: "'Now in determining if the amount was reasonable, there's no mathematical formula by which you must proceed. The test as to whether the settlement is reasonable is what a reasonably prudent person in the position of the Defendant would have settled for considering the liability and damage aspects of the Plaintiff's claim, as well as the risk of going to trial.'" Black, supra, 239 Conn. at 161, n. 17.

[25] Joel Rottner, the expert that North River disclosed to opine as to the reasonableness of the Kofkoff settlement amount in the CNB Action, handled the trial and appeal for Maryland Casualty in the Black case and testified in his deposition that the trial court's jury instruction, in a vacuum, was appropriate. (A241-42.)

Faulkner's opinion was based on an adequate factual foundation and was arrived at by following the standard set forth by this Court.

III. The trial court improperly granted North River's Motion for Summary Judgment, dated October 6, 2008

A. Standard of Review

As discussed in supra Section II.A., DiPietro establishes that a plenary scope of review governs decisions precluding expert testimony in the context of a summary judgment proceeding, as well as decisions granting summary judgment.

B. Summary judgment was improper because Faulkner had an adequate factual foundation, and because genuine issues of material fact existed and doubts with respect to same should have been resolved in Plaintiffs' favor

As discussed at length in Section II of this brief, the trial court erroneously found that Faulkner lacked an adequate foundation for his opinion that the Plaintiffs' Settlement was objectively reasonable. As a result, the summary judgment decision must be reversed because it was premised on the trial court's improper preclusion of Faulkner's testimony.[26]

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[26] Moreover, as discussed in Section II.E, supra, the trial court improperly resolved disputed issues of material fact in North River's favor. The following genuine issues of material fact existed: (1) The trial court found Faulkner's Opinion was based only on mediation statements even though he reviewed an extensive list of 45 documents pertinent to the CNB Action, and not just mediation statements; (2) the trial court assumed certain facts were "essential" for Faulkner to rely on to have an adequate factual foundation, when the Plaintiffs displayed such facts were not essential; (3) the trial court assumed Faulkner lacked personal knowledge as to some of these facts it deemed "essential," despite Plaintiffs showing that this assumption was inaccurate; (4) the trial court assumed that the facts of the CNB Action were so complex that the lay juror could not comprehend them without receiving expert testimony, when Plaintiffs displayed that this assumption was inaccurate. North River had the burden to prove that no genuine issues of fact existed, and failed to do so. (A8-14.) The trial court failed to adhere to its standard of review in granting summary judgment, improperly resolved genuine issues of material fact in North River's favor, and its decision must respectfully be reversed.

C. Summary judgment was improper because expert testimony was not required

Even if this court were to find proper the preclusion of Faulkner, the trial court's award of summary judgment to North River should still be over turned because Plaintiffs need not rely on expert testimony to prove the objective reasonableness of the settlement.

"Expert testimony is *required only* when a disputed matter is *manifestly* beyond the ken of the average trier of fact, be it judge or jury." Surensky v. Sweedler, 140 Conn. App. 800, 812-13 (2013), quoting Michalski v. Hinz, 100 Conn.App. 389, 404, 918 A.2d 964 (2007) (emphasis added). Unlike in professional malpractice claims, for example, the instant case would not have required a jury to evaluate the conduct of a professional acting according particularized industry standards. Instead, a lay jury would have been asked to evaluate the reasonableness of a settlement made by laymen. Consider Downs v. Trias, in which this Court held that while expert testimony is required in a medical negligence action in order for jury to determine that the defendant failed to meet the prevailing professional standard of care, "[expert] testimony regarding professional norms is not relevant to the question of whether a physician's disclosure satisfies the lay 'materiality' test." 306 Conn 81, 88 (2012).[27]

The trial court concluded that "the complexity of the underlying litigation involving the Rytmans' claims against the Kofkoffs is clearly reflected in the Kofkoffs' own mediation statements and in Robert Kofkoff's deposition testimony." (A15, A17.) "The jury would

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[27] For the same reason, to the extent that North River's arguments to the trial or Appellate Courts relied upon medical negligence actions in which a court held that expert testimony was required are unavailing. It is well-established that medical negligence actions require expert testimony. See, e.g. Davis v. Margolis, 215 Conn. 408, 416 (1990). No comparable rule exists in Connecticut requiring expert testimony to establish the objective reasonableness of a settlement.

need the assistance of an expert who had reviewed and considered the extensive, complex underlying litigation, including evidence and other discovery adduced from discovery; considered the legal theories underlying the claims and defenses, and the standards of proof; and then, based on his or her expertise, formed an opinion as to what would be an objectively reasonable settlement." (A20.)

In so holding, the trial court compared the issues in this case to those found in the complex patent and trademark matter in St. Onge, Stewart, Johnson and Reens, LLC v. Media Group, Inc., 84 Conn. App. 88 (2004), to conclude that the jury in this matter would confront issues that "go well beyond the ordinary knowledge of lay juries."[28] (A20.) St. Onge involved a collection action for attorney's fees in which a law firm sought payment from its client for complex patent and trademark work that it performed over a two-year period. Id. at 89. "The principal issue [was] whether, in order to recover in a jury trial, the law firm was required to present expert evidence about the reasonableness of its fees." Id.

The St. Onge court refused to adopt a bright line rule mandating expert testimony in all cases where a jury is asked to decide whether an attorney is entitled to collect legal fees. Instead, it held that "[this] plaintiff...was required to provide evidence about the necessity for the services rendered and the reasonableness of the plaintiff's fee structure in *light of community standards.*" Id. at 97 (emphasis added). Therefore, St. Onge, like other

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[28] The trial court also relied on Black, supra, 239 Conn. at 160, for the proposition that expert evidence was necessary "to assess the size of the possible recovery by the Rytmans against the Kofkoffs if the underlying case had gone to trial, and to assess the degree of probability that the Rytman's claims would succeed." The trial court further concluded that "assessment of the risk of going to trial in that complex litigation requires expert testimony." (A20. citing Black, 239 Conn. at 161, n.17.) However, this Court in Black did *not* conclude that expert testimony was mandated in order to assist the jury in evaluating the reasonableness of a settlement. Note 17 merely contains the trial court's jury charge.

cases requiring jurors to consider whether a professional conformed to prevailing professional norms, is distinguishable. The court essentially held that in order to prevail in an action seeking to recover fees, an attorney must establish the reasonableness of his fees in light of the existing norms for that profession. The court noted that *no witness* in that case, not even the plaintiff, provided the jury with any factual basis for determining the reasonableness of the fees, implying that had the plaintiff testified as to the factual basis for the fee, this likely would have sufficed. Id. Moreover, because the patent and trademark issues were highly specialized and beyond the ken of even most lawyers, the amount the lawyer should charge for providing such specialized services concerns a subject matter no layperson can expect to understand without expert guidance. Thus, "the jury cannot be presumed to have had the knowledge to evaluate the necessity for the services rendered by the plaintiff or the propriety of the fees that it charged the defendant." Id. at 100.

Relying on Black, supra, 239 Conn. at 160, the trial court concluded that the jury would need expert evidence in order to determine whether the settlement was objectively reasonable. (A16.) The Black decision, however, does *not* categorically hold that a plaintiff must produce expert testimony to establish the reasonableness of a settlement. While experts did testify in Black, that Court did not hold that such testimony was mandatory. Id.

In the instant case, Plaintiffs acknowledge that the issues raised by the Rytmans in the underlying litigation are numerous and varied. The need for testimony of some sort to render these events accessible and meaningful to a jury is inescapable. Plaintiffs provided the trial court with adequate support for the proposition that this issue was not outside of the ken of the average trier of fact. (Pltfs.' Obj. to Dft. North River's Mot. for Summ. J. 4-8.)

Neither Defendant nor the trial court could identify any issue so esoteric or abstruse as to require expert explanation, instead relying solely on the sheer volume of factual occurrences to justify imposing a requirement of expert testimony. However, there was no better witness than Robert Kofkoff, who lived all of the events spanning more than fifteen years' worth of litigation. Even testifying as a layman,[29] Robert Kofkoff was in the best possible position to simplify and explain to a jury the sequence of events, to the extent it was relevant to the determination of objective reasonableness. He would have further explained his reasons for agreeing to the 2002 settlement of the CNB action. (A211-25.)

The reasoning employed by this Court in Downs v. Trias permitting lay testimony as to a key element of the plaintiff's claim should apply with equal force here. Robert Kofkoff has an intimate knowledge of the CNB Action, and, more than any other witness, is best suited to discuss the facts and circumstances present in the CNB Action that influenced his decision to settle and at what amount to settle. Expert testimony was not required, and the court erred in granting summary judgment on this basis.

Robert Kofkoff's testimony, combined with other fact witnesses like plaintiff Joseph Fortin and numerous documentary exhibits, was more than adequate to educate the jury on the facts relevant to the Kofkoffs' decision to settle the CNB Action. This would have amply enabled the jury to determine "what a reasonably prudent person in the position of the Defendant would have settled for considering the liability and damage aspects of the Plaintiff's claim, as well as the risk of going to trial.'" Black, supra, 239 Conn. at 161, n. 17

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[29] After the trial court's decision granting North River's motions to preclude and for summary judgment, Plaintiffs moved for permission to disclose Robert Kofkoff as an expert. This motion was denied. (Mem. of Decision, May 6, 2009.)

North River's expert certainly was not prepared to "review and consider complex underlying litigation, including evidence and discovery...", as the trial court seemed to have expected Faulkner to do. See supra, Section II.D, (A48, A227) (Rottner determined it was impracticable to review all of the underlying facts and instead relied on Robinson & Cole's report). Rottner also conceded that Robert Kofkoff had a better understanding of the facts related to the CNB Action than even Robinson & Cole, the law firm that represented him and his companies in that litigation. (A230.)

While the CNB Action involves a multitude of parties, contracts, alleged conspiracies and events spanning the course of many years, not one single event, contract, conspiracy or fact is beyond the reach of the ordinary knowledge of a lay jury. Unlike St. Onge, the jury here would not have been required to decide whether specialized services were required or what constitutes a reasonable fee for such services. There were genuine issues of material fact surrounding Plaintiffs' ability to establish the objective reasonableness of the settlement, and the trial court erred in granting summary judgment for Defendants.

IV. CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the trial court's decision of February 19, 2009, and the Appellate Court's decision of January 1, 2013, and remand this case back to the trial court with directions that the Defendant's motions to preclude and for summary judgment be denied in their entirety.

RESPECTFULLY SUBMITTED
PLAINTIFFS-APPELLANTS

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